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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DANIEL BROIN, Defendant and Appellant.	A154052 (Sonoma County Super. Ct. No. SCR-678074)

Daniel Broin appeals from a conviction of grand theft by embezzlement. During jury deliberations, the trial court discharged a juror whom it knew to be the single holdout because it believed the juror felt unable to put aside speculation about evidence not presented during trial. The juror had expressed a question about reasonable doubt that left unclear whether he was considering a speculative scenario or considering an absence of what he perceived to be necessary evidence. Without clarifying the point, and after instructing the juror that reasonable doubt could be based only on the evidence presented, the judge asked whether the juror would be able to follow the instructions and, when he replied in the negative, excused him from the jury. As we will explain, the record does not support the trial court's reason for finding the juror unable to perform his duty, requiring us to reverse the judgment.[1]

[1] Given this conclusion, it is unnecessary for us to consider appellant's additional contention that he received ineffective assistance of counsel due to his attorney's failure to object to prejudicial misstatements of law in the prosecutor's closing argument.

BACKGROUND

The Finnish American Home Association (FAHA) is a nonprofit organization in Sonoma that promotes Finnish culture and provides housing for low and moderate income seniors. The organization owns a 48-unit apartment building, four rental income duplexes, an events hall, a swimming pool, two saunas, and a gazebo. FAHA has a 15-member board of directors (Board).

Appellant was hired as the executive director of FAHA in November 2010, and ran day to day operations. According to the terms of his offer of employment and the testimony of Board members, appellant's compensation package included base compensation and eligibility for bonuses based on fundraising money generated by his actions.[2] His compensation did not include a housing allowance.[3]

In 2015, FAHA formed a financial oversight committee (committee). In reviewing the organization's financial records, the committee discovered irregularities including checks written by appellant on FAHA accounts to appellant's landlord, categorized in FAHA records as "landscaping,"[4] and cashier's checks appellant caused to be issued to attorney James Sansone, who had represented FAHA in evictions and also represented appellant personally, totaling considerably more than the amount Sansone charged for his work on behalf of FAHA.[5] It was also discovered that appellant had

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[2] Appellant received two bonuses while employed by FAHA. He estimated that he raised approximately $500,000 in new revenue during his tenure.

[3] The Board president at the time of trial, Stephen Rowe, testified that there were FAHA employees who lived rent-free in a FAHA property, but he was not aware of any whose rent was paid with FAHA funds. The job listing for the position for which appellant was hired offered "on site housing" as a part of compensation.

[4] The Board treasurer testified that the categorization would have been based on how appellant reported the charge to the FAHA bookkeeper.

The FAHA bookkeeper testified that when she asked appellant about Ken Dixon in connection with preparing federal tax forms (W-9 and 1099) for vendors, he told her Dixon provided "building supplies" and no W-9 was needed.

[5] Sansone had charged FAHA $6,500, for work on tenant evictions prior to 2015. Appellant had five cashier's checks issued from the main FAHA account in 2012 and

opened an account called "Capital Improvements" without Board approval,[6] into which he deposited checks payable to FAHA. Appellant withdrew funds and wrote checks from this account, none of which appeared to be for FAHA purposes, including purchases from Costco, Whole Foods, Circle K, Devotion Animal Hospital, Kenneth Cole, Tommy Hilfiger, Stark's Steak, and Home Depot.

One check deposited into the Capital Improvements account was from Donald Hagelberg, a "lifelong" member of FAHA who was 76 years old at the time of trial. Hagelberg testified that he gave appellant the $82,100.05 check, written to FAHA, in July 2014 as a donation to FAHA. He did not tell anyone else about the donation at the time, and told appellant he wanted it to remain a secret, then told the board about it in 2017 after hearing that there were "difficulties justifying the administration of FAHA by" appellant. He did not tell appellant any of the funds were for appellant's personal use.

During the investigation of this case by law enforcement, it was determined that a cashier's check for $28,510 from the Capital Improvements account was deposited into an account appellant opened in his name at the Redwood Credit Union. A check from the same FAHA account for $16,952.55 was deposited into appellant's personal account at Community First Credit Union.

Defense

Appellant's defense was based in part on his having been "caught up in FAHA infighting" and targeted by a few Board members who "rushed to judgment." He testified that he was the subject of hostility and discrimination based on his sexual

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2013, payable to Sansone, totaling $33,000. Sansone testified that these were for work done for appellant and not related to FAHA.

[6] Board member Minna Rodgers testified that she signed the bank signature card for this account but had no access to the account prior to learning about it during the committee's audit. She testified that appellant had given her signature cards to sign in order to update bank records and she assumed the card she signed for the capital improvements account related to an existing account.

orientation and race, and that four members of the Board "quit because of the situation." Several defense witnesses supported appellant's view.[7]

As to specific financial issues, appellant testified that he started paying rent to Dixon with FAHA checks after being told by the FAHA president that the Board had approved providing him with a housing subsidy as part of his compensation.[8] He denied using FAHA funds to pay his personal legal expenses, but did not have bank statements showing payments to Sansone because, he said, his personal records were destroyed in the Napa earthquake and he did not think to get records from his bank.

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[7] For example, one witness described having heard Board members make "inappropriate" and "derogatory" comments to appellant because of his sexual orientation. Former Board president Tuula Beals testified that she had not heard of any wrongdoing by appellant prior to the committee's work, and that Rowe suspended appellant before reporting his suspicions to the police, contrary to the procedure called for in the committee's charter and an understanding that the committee would bring issues to the Board before decisions were made. Beals testified that she resigned from the Board because she felt trust in her had been lost, and that it was "insinuated" she and two other Board members were "in collusion" with appellant. According to Rowe, Beals was removed as president of the Board because members felt she was not performing her job correctly in that she did not know about the financial irregularities the committee found. Former Board treasurer Aini Karkianen, who testified that FAHA finances had been "terrible" and experienced "vast improvement" after appellant was hired. Appellant was responsible for "significant new revenue." Karkianen was asked to leave the Board amid suspicion of something like "collusion."

[8] Appellant testified that the Board initially offered him a three-bedroom unit on campus as part of his compensation, but his two large dogs would have violated rental policies. At his 90-day review, the FAHA president mentioned the possibility of a housing subsidy, and this was written onto the report appellant signed, but he was not given a signed copy. Later, the president told appellant the subsidy had been approved by the Board. At trial, however, the president denied consenting to his paying rent or personal expenses with FAHA funds. The copy of the 90-day review report the prosecution put in evidence at trial did not include the handwritten provision appellant described and was signed by appellant but not by the president. Appellant testified that when he was confronted by Board members and the police about the accusations against him, he was not permitted to go back into the office, including to get his copy of the 90-day review report.

Appellant testified that he was directed to open the Capital Improvements account by Rodgers, and that they were putting all donations by check into that account at the time Hagelberg made his donation. He testified that a $12,000 expenditure of FAHA money for Camping World was a mistake; he thought it was coming out of his personal account. He testified that the $28,510 deposit into his Redwood Credit Union account was a five percent bonus from FAHA and although he did not remember depositing the $16,952.55 check, he recognized the amount as "a partial bonus amount that was due." Asked about eight cash withdrawals in one month, appellant testified the majority were to pay day laborers hired to move office equipment during a renovation; one of three cash withdrawals on a single day of another month was to pay a housekeeper in cash but he did not know why there were other withdrawals on the same day. Several withdrawals he was asked about he did not recall. The Kenneth Cole and Tommy Hilfiger expenses were for prizes for a FAHA raffle, and the Stark Steakhouse expense was for a staff appreciation meeting. He had no explanation for the animal hospital expense. Appellant testified that in 2012 through 2014, his duties were expanded and he was overworked and stressed to the point his health was affected.

Appellant was charged with one count of grand theft by embezzlement (Pen. Code, § 487, subd. (a)),[9] with a sentence enhancement for commission of a pattern of related felonies involving fraud or embezzlement and the taking of more than $100,000 (§ 186.11, subd. (a)(3)) and a probation ineligibility enhancement for taking over $100,000 (§ 1203.045, subd. (a)), and one count of theft from an elder exceeding $950 (§ 368, subd. (d)). After a jury trial, he was found guilty of grand theft and the allegation of taking over $100,000 was found true. He was found not guilty of theft from an elder, and the related felonies enhancement was found not true. He was sentenced to the middle term of two years, with the last 90 days to be served on mandatory supervision, and ordered to pay restitution in the amount of $139,109.650.

[9] Further statutory references will be to the Penal Code unless otherwise specified.

DISCUSSION

Appellant contends his conviction must be reversed due to the trial court's improper decision to discharge a juror during deliberations. As will be explained, the court's decision was based on what it perceived to be the juror's inability to set aside a "scenario" the juror had constructed in his mind that was based on speculation rather than evidence presented in court. Appellant maintains the juror was in fact only expressing doubt as to the sufficiency of the prosecution's case.

" ' "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his or her duty, or if a juror requests a discharge and good cause appears therefor, the court may order the juror to be discharged. . . ." (§ 1089.) Removal of a juror under section 1089 is committed to the discretion of the trial court, and we review such decisions by asking whether the grounds for such removal appear in the record as a demonstrable reality.' (*People v. Thompson* (2010) 49 Cal.4th 79, 137.)" (*People v. Powell* (2018) 6 Cal.5th 136, 155.)

"This 'demonstrable reality' standard requires a less deferential, more searching review of the factual predicate for discharging a juror than what is entailed by the substantial evidence standard. ([*People v.*] *Lomax* [(2010) 49 Cal.4th 530,] 589.) Crucially, in order to uphold the trial court's determination, we must conclude ' "that the court as trier of fact *did* rely on evidence that, in light of the entire record, supports its conclusion that bias was established." [Citation.]' (*Ibid.*; see also *id*. at p. 590 ['The inquiry is whether "the trial court's conclusion is manifestly supported by evidence on which the court actually relied." [Citation.]'].)" (*People v. Perez* (2018) 4 Cal.5th 421, 446.) "To determine whether the trial court's conclusion is 'manifestly supported by evidence on which the court actually relied,' we consider not just the evidence itself, but also the record of reasons the court provided. ([*People v. Barnwell* (2007)] 41 Cal.4th [1038,] 1053.) In doing so, we will not reweigh the evidence. (*Ibid.*)" (*People v. Wilson* (2008) 43 Cal.4th 1, 26.)

Here, after the jury had been deliberating for approximately seven hours over the course of three court days, the court received a note presenting a question from Juror No. 3045: "Can I have a doubt based on evidence I feel must exist in my head that was not presented? An accompanying note asked, on behalf of the rest of the jurors, "how do we continue as a jury if a juror continues to speculate evidence that has not been presented?"

The court initially proposed responding to the juror, in the language of CALCRIM No. 222, "Evidence is the sworn testimony of witnesses, the exhibits admitted into evidence and anything else I told you to consider as evidence." The prosecutor, understanding the juror to be saying he or she wanted to consider "evidence that's in their head" or "they feel must exist, that's in their head," thought the juror should be told directly that he or she "cannot consider evidence that hasn't been presented." Defense counsel viewed the note as indicating the juror was making an inference "about something that must exist based on what [he or she] has heard," which to counsel "sounds like reasonable doubt," and argued it was not inappropriate to have a doubt based on a reasonable belief that something that "should be there" was not presented. Defense counsel asked the court to give the jury CALCRIM No. 220 instruction on reasonable doubt in addition to CALCRIM No. 222 instruction, because "to limit it to saying, 'No, you can't do that,' when there is a reasonable doubt" would be "a mistake."

The court, viewing the juror's question as reflecting "speculation" rather than reasonable doubt and believing it necessary to respond by directly stating reasonable doubt had to be "based on the evidence that was presented, not with whatever speculation might be going on in their minds," answered Juror No. 3045's question as follows: "No, you may not consider evidence that was not presented. Per Jury Instruction 222, evidence is the sworn testimony of witnesses, the exhibits admitted into evidence, and anything else I told you to consider as evidence. You may have reasonable doubt based on the evidence presented. Please see Jury Instruction 220 regarding reasonable doubt." In answer to the second question, the court told the other jurors, "Please continue to deliberate after the receipt of this note. Advise me if you are unable to deliberate."

After brief further deliberations, the court received another note stating, "Juror 3045 is no longer willing to deliberate today. He says he can come back in the morning or dismiss himself from the jury. We are deadlocked at eleven-one. Please advise us what to do." The prosecutor expressed concern that Juror No. 3045 might be unwilling to follow the law set forth in the jury instructions because he was "considering speculation versus evidence," and suggested that if this was the case, an alternate should be considered. The court, recognizing that "[i]t could also be that he has reasonable doubt, and it's eleven to one, and they want to convince him that he should come in their direction, and he's not willing to do that," concluded that it needed to question the juror.

Outside the presence of the other jurors, the court asked Juror No. 3045 to indicate, without saying what his deliberations had involved, "whether or not you are willing to continue deliberating with the other jurors." The juror said, "I am. My problem today was that I had to present my point of view. And this kept me up all night long. And so new information today." Again cautioning the juror not to disclose what his deliberations involved, the court asked if he felt he could continue "communicating with the jurors openly" and he said, "I think I can." The juror indicated that he understood the court to have answered "no" to his question whether he could "have a doubt based on evidence that [he felt] 'must exist in my head that was not presented' " and, asked whether he was "able to follow [the court's] direction that you're required to follow the law," said, "I am, I think I understand the direction. Today, I am a little scatter-brained, because I didn't get much sleep last night, because I was going over this stuff to, to talk about today." Asked whether his "feeling like today you maybe started off a little under the weather, having not gotten a lot of sleep . . . impacted the way [he was] able to communicate with the other jurors today," Juror No. 3045 said, "It's possible, yeah." The court asked whether, if they stopped for the day and returned "with a fresh start," Juror No. 3045 would be "able to speak to [the jurors] openly and communicate about deliberations," and the juror said, "I think I would be clearer in my head about . . . my ability to continue to deliberate." To the court's question whether he had concerns about his ability to continue to deliberate, the juror said he did not know

how to answer and explained, "I understand I'm not allowed to consider things that weren't presented. But I had come up with the scenario in my head, and I'd pretty much convinced myself of this, and now I have to go back and . . . reprogram my—re-go over this stuff."

After the juror confirmed that he understood he could "only consider the evidence that was presented" and could have reasonable doubt "based only on the evidence that was presented," not "a scenario that you kind of created in your mind," the court asked, "You feel like, before today, you had created a scenario in your mind that was not based on evidence in this case?" The juror responded, "I had questions about things that I thought should have been presented, that didn't seem like it would be difficult to—it wasn't, and I was having doubts because it was not there." Asked if he thought he would be able to clear his mind overnight, the juror said, "Yes. Well, I'm not entirely sure that I can. But I, I think that I can. I think I would know in the morning if I could." He confirmed again that he was willing to follow the law provided by the court, and when asked, "[i]t's about evidence, or a scenario that you have created, or the evidence that was presented to you, or not presented to you, that's posing a problem," replied, "It's that I have come up with a doubt, okay?"

As the court summarized the situation after questioning Juror No. 3045, "despite his language" about having "come up with a scenario in his head, he also raises a valid point that can be reasonable doubt, that he would have wanted to hear potentially more evidence that wasn't presented, which could establish in fact a reasonable doubt, if that's how he feels about it. . . . It doesn't seem to me that he's refusing to deliberate. He just has a different interpretation, or maybe outcome even of the evidence that he did hear. He understands he needs to set aside anything that he's speculating about, only use the evidence, and I think he will honestly say tomorrow morning whether or not he thinks that's possible. If he comes back in tomorrow morning and says, 'I can't do that, I have created this scenario, and I can't step away from that,' then I will remove him.' [¶] Just to be clear, that's different than, 'I have a doubt.' But he sort of expressed both of those things, and I want to give him an opportunity to think about it, determine whether or not

he can set aside what he might be speculating about, and just base his decision solely on the evidence that was presented."

Prior to the court questioning the juror the following morning, defense counsel suggested the only questions that should be asked were whether the juror was refusing to deliberate, with no further inquiry if the juror said "no," and whether he was unwilling or unable to follow the law, again with no further inquiry if the answer was "no." Counsel expressed concern that "further language" could inadvertently communicate "that any inferences you make that are reasonable that weren't stated in evidence, you can't go there," and asked the court to make sure the juror understood reasonable doubt can be inferred from the lack of evidence or gaps in the evidence.

The court, referring to the juror's statements about having "created a scenario in his own mind that is not based upon the evidence," said it intended to ask whether "he's willing to consider only the evidence that was introduced in this trial to determine whether the People have met their burden of proof." The court stated, "I just need to make sure he's going to follow the law, he can deliberate today, and he's going to use only the evidence that he heard in this trial to determine whether or not . . . the People have met the burden of proof he's already been instructed on."

When Juror No. 3045 arrived, the court asked, "So do you feel like you're in a position to continue deliberating today?" The juror replied, "I don't think I'm going to be able to do it." The court then asked, "Do you feel like you are not able to follow my instructions regarding the law?" Juror No. 3045 replied, "I am afraid so." At that, the court informed counsel it was going to excuse the juror and replace him with the first alternate. The court declined defense counsel's request for further inquiry into why Juror No. 3045 felt he could not deliberate. To counsel's expression of concern that the juror, as the single holdout, might be trying to avoid an emotionally challenging situation rather than actually refusing or feeling unable to follow the law, the court responded that the day before the juror had said his problem with deliberations was not to do with his relationship with the other jurors but that "he had created this scenario in his head that he could not set aside."

As the trial court initially recognized, Juror No. 3045's description of the problem he was having was unclear as to whether he was speculating about evidence that was not presented in court or was entertaining a doubt about appellant's guilt or innocence because the prosecution did not present evidence he believed should have been available if appellant was guilty. The latter situation, as the trial court also recognized, would involve not improper speculation but a perceived absence of sufficient evidence to demonstrate guilt that would be a proper source for reasonable doubt if founded on reasonable inferences. "The reasonable doubt prescribed by statute may well grow out of the lack of evidence in the case as well as the evidence adduced." (*People v. Simpson* (1954) 43 Cal.2d 553, 566; *Johnson v. Louisiana* (1972) 406 U.S. 356, 360 ["Numerous cases have defined a reasonable doubt as one ' "based on reason which arises from the evidence or lack of evidence." ' "].)

Unfortunately, the instructions the court gave Juror No. 3405 muddied the issue. The court first responded to the juror's question by saying, "[n]o, you may not consider evidence that was not presented" and "[y]ou may have reasonable doubt based on the evidence presented." It later asked Juror No. 3045 if he understood "you can only consider the evidence that was presented" and "you can have reasonable doubt in the case, but it has to be based only on the evidence that was presented . . . not, as you said, a scenario that you kind of created in your mind."

In *People v. Simpson, supra,* 43 Cal.2d at page 565, the trial court instructed the jury that "reasonable doubt" means " 'a doubt which has *some good reason* for its existence *arising out of evidence in the case*; such doubt as you are able to find a *reason for in the evidence*.' " *Simpson* held this language "could have been confusing to the jury" for the reason stated above—the "reasonable doubt prescribed by the statute may well grow out of the lack of evidence in the case as well as the evidence adduced." (*Id.* at p. 566.) *People v. McCullough* (1979) 100 Cal.App.3d 169, 182, quoted *Simpson* in

holding that a trial court "misled the jury by telling it that the 'doubt must arise from the evidence.' "[10]

The court's phrasing in the present case—that reasonable doubt had to be "based only on the evidence that was presented"—created the same potential for confusion by failing to clarify that reasonable doubt could be based on lack of evidence, as well as on the evidence presented. This potential confusion was particularly problematic because Juror No. 3045's comments clearly suggested that lack of evidence, rather than speculation, was in fact the problem. The juror first phrased his question as whether he could "have a doubt based on evidence I feel must exist in my head that was not presented," then later said he "had questions about things that I thought should have been presented, that didn't seem like it would be difficult to—it wasn't, and I was having doubts because it was not there," and "I have come up with a doubt."

"[W]hen reinstruction does not resolve the problem and the court is on notice that there may be grounds to discharge a juror during deliberations, it must conduct 'whatever inquiry is reasonably necessary to determine' whether such grounds exist." *(People v. Cleveland* (2001) 25 Cal.4th 466, 480, quoting *People v. Burgener* (1986) 41 Cal.3d 505, 520.) Here, as the court explained its thinking to the attorneys, before directing Juror No. 3045 to consider the situation overnight, it had concluded that the juror was not refusing to deliberate but had a "different interpretation" of the evidence he heard at trial, and that he understood he had to set aside "anything that's he's speculating about" and "only use the evidence." The remaining question, which the court expected the juror to resolve in further considering the matter, was whether the juror would be able to put aside his speculation. But in directing the juror that he could not "consider evidence that was not

[10] In *People v. McCullough, supra,* 100 Cal.App.3d at pages 180–181, as in the present case, the court's responses to a juror's questions about reasonable doubt also included "[y]ou have to understand that you must decide the case on the basis of the evidence presented here in the courtroom, and not on the basis of any guesswork or speculation—but only on the evidence presented by either side here in the courtroom." The juror then asked, "So then the doubt must arise from evidence?" and the court answered, "yes." (*Id.* at p. 181.)

presented" and could have reasonable doubt "based only on the evidence that was presented," the court failed to address the possibility of a reasonable doubt based on *absence* of evidence. Despite the court's earlier express recognition that it had to determine which of the possible interpretations of Juror No. 3045's difficulty was accurate, its final inquiry did not clarify whether Juror No. 3045 was feeling locked into a speculative scenario he had created or feeling a doubt as to appellant's guilt because evidence he would have expected to see was not presented. Nor did the court ascertain whether the juror understood the court to have directed him not to consider lack of evidence, as well as not to consider any speculative scenario.

Because these points were not clarified, Juror No. 3045's statement that he did not feel he would be able to follow the court's instructions was, in effect, meaningless with respect to his ability to perform his role as a juror. While it may have been entirely appropriate to excuse the juror if he was unable to put aside a speculative scenario he had imagined, it would not be permissible to excuse him for being unable to ignore his perception that evidence was lacking in the prosecution's case. "A juror cannot be discharged for 'failing to agree with the majority of other jurors or for persisting in expressing doubts about the sufficiency of the evidence in support of the majority view.' " (*People v. Salinas-Jacobo* (2019) 33 Cal.App.5th 760, 777, quoting *People v. Engelman* (2002) 28 Cal.4th 436, 446.) " 'A juror who refuses to follow the court's instructions is "unable to perform his duty" within the meaning of Penal Code section 1089.' " (*People v. Wilson, supra,* 43 Cal.4th at p. 25, quoting *People v. Williams* (2001) 25 Cal.4th 441, 448.) But " '[g]reat caution is required in deciding to excuse a sitting juror' (*People v. Allen and Johnson* (2011) 53 Cal.4th 60, 71) especially where, as here, a lone holdout juror is excused. 'A court's intervention may upset the delicate balance of deliberations. The requirement of a unanimous criminal verdict is an important safeguard, long recognized in American jurisprudence. This safeguard rests on the premise that each individual juror must exercise his or her own judgment in evaluating the case. The fact that other jurors may disagree with a panel member's conclusions, or

find disagreement frustrating, does not necessarily establish misconduct.' (*Ibid*.)" (*People v. Harrison* (2013) 213 Cal.App.4th 1373, 1382–1383.)

The trial court removed Juror No. 3045 because it believed the juror had concluded he was unable follow the court's direction to set aside speculation and decide the case solely on the evidence. "[R]emoval of a holdout juror is proper where the facts demonstrate the juror is unable to follow the law." (*People v. Harrison, supra,* 213 Cal.App.4th at p. 1382.) Here, however, the court's belief that Juror No. 3045 meant he would not be able to follow directions to set aside a speculative scenario he had imagined was based on its *assumption* that this was the issue with which the juror was struggling, and the court did nothing to confirm whether this assumption was accurate. The juror's comments the day before that he had "doubt" based on evidence he would have expected to see that had not been presented suggest a very real possibility that what the juror had referred to as a "scenario" he had created was actually doubt as to appellant's guilt due to an absence of evidence of guilt. Given the potential for confusion arising from the court's instructions to Juror No. 3045 and the lack of clarification of the juror's subsequent statements, the record does not "manifestly support[]" the court's conclusion that the juror could not perform his duties due to inability to put aside his speculation. (*People v. Perez, supra*, 4 Cal.5th at p. 446; *People v. Salina-Jacobo*, *supra*, 33 Cal.App.5th at p. 782.) The grounds for removal of Juror No. 3045 do not " 'appear in the record as a demonstrable reality.' " (*People v. Powell*, *supra*, 6 Cal.5th at p. 155.)

Juror No. 3045 was the sole holdout juror. After he was excused and the alternate juror seated, the jury deliberated only an hour and a quarter before reaching a verdict. The prejudice to appellant is obvious. (See, *People v. Delamora* (1996) 48 Cal.App.4th 1850, 1856; *People v. Salinas-Jacobo, supra,* 33 Cal.App.5th at p. 782; *People v. Cleveland, supra,* 25 Cal.4th at p. 486.)

DISPOSITION

The judgment is reversed. Retrial of the case is not barred by the double jeopardy clauses of the California and federal Constitutions. (*People v. Armstrong* (2016) 1 Cal.5th 432, 460; *People v. Salinas-Jacobo, supra,* 33 Cal.App.5th at p. 782.)

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Kline, P.J.

We concur:

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Richman, J.

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Stewart, J.

People v. Broin (A154052)